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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 772

JOSEPH T. MARZEC, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF

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REPLY BRIEF

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1. On page 4 of its Brief in Opposition the Government states that on January 18, 1957 "the United States Attorney moved for a severance, stating that Struett had represented at various times that Petitioner would be available to testify on behalf of the Government; that four days earlier however Struett had advised that Petitioner would not testify so long as he remained joined with the other defendants * * *." The implied effect of this statement is that Petitioner's counsel had represented to the Government that Marzec

would be available to testify against the other defendants even though joined with them for trial, and on January 14, 1957 he shifted his position. This supposed shift of position was denied in Petitioner's Motion to Vacate and the true facts are therein set forth. (A-28-78). The Government had three different versions of its understanding with respect to Petitioner's position about testifying.[1] As fully appears in Petitioner's Motion to Vacate, Marzec was at all times ready and willing to testify against the other three defendants, but he could do so only if a severance was granted as to him. Obviously Marzec could not be tried jointly with the other defendants if he was a necessary Government witness and the Government finally conceded this on January 23, 1957 (A-21).

The Government states that Sobieraj and Kusper kept records of all the commissions they received and that Brandt and the Petitioner did not (Brief 6). None of the defendants except Marzec kept any records of the receipt of the commissions. Marzec still retained in his possession a few fragmentary records show-

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[1] (1) In its Motion for Severance filed January 18, 1957 the Government alleged that Petitioner's counsel had assured it that Marzec would testify against the other defendants even if joined and that it wasn't until January 14, 1957 that counsel advised to the contrary.

(2) At the hearing on January 23, 1957 it qualified that statement by asserting in open court that the Government was under the impression that Marzec would be available to testify even though joined.

(3) In its Answer to the Motion to Vacate the Government alleged that at all times after January 23, 1956 when Petitioner's Motion for Severance was denied until January 14, 1957 it did not know whether Marzec would testify against the others if joined (A-82).

ing at least that he had shared these cash commissions with the others. Brandt who had always received his share in cash had no records but finally admitted that he had received the commissions in substantially the same amounts as alleged by Marzee (G.A. 302).

At the trial the Government had Sobieraj produce a small black book belonging to his mother-in-law which reflected some of the commissions distributed to him by Marzee and which he testified he had shared with her. Sobieraj had produced this same black book before the Grand Jury and the Government had rejected it as is indicated by the charges of the indictment. The Government knew that Sobieraj was not turning all his commissions into the partnership. Despite this knowledge the Government put Sobieraj on the stand and had him testify that all the commissions he received from Marzee were turned in to this partnership and were reflected in the little black book (Pet. 17, 57-59).

The indictment against Kusper covered only the cash commissions he had received from Marzee since the payments received by check had been reported. His books and records did not reflect the cash payments (G.A. 303). The Government on January 23, 1957 advised the Court that it had procured new and additional evidence against Kusper (A-21). On February 7, 1957 Worcester testified that he could not find and the Government had no evidence that Kusper had shared in the cash commissions (G.A. 302-305). On February 13, 1957 the United States Attorney told the jury that the evidence was quite clear that whenever possible Marzee obtained cash from the brokers and that he unquestionably distributed some of that cash to the other three.

2. The Government does not deny that had it not been for the cooperation and testimony of Petitioner the other three defendants could not have been indicted and two of them successfully prosecuted (Pet. P. 11). It attempts to avoid the rule of the *Whiskey Cases*, 99 U.S. 594, by asserting that there was no promise of immunity and further that there was a "scrupulous refusal to extend any *quid pro quo* whatever". This argument loses sight of the fact that Petitioner's "equitable title to mercy" (Immunity) does not depend upon an agreement between the parties but is implied from the benefits given and received—much the same as in the law of quasi contracts.

3. The Government argues that it did nothing to lead Petitioner's counsel to believe that it was unnecessary for him to prepare for trial. The record indicates that on January 23, 1956 the Government represented that it had reason to believe that Petitioner would testify for the Government (G.A. 31). It then kept the Petitioner joined with the other three defendants until January 23, 1957 during all of which time it refused to clarify its position as to how it intended to proceed with all the defendants joined for trial. It knew that Petitioner's counsel was making no preparation for trial and was unprepared (Pet. 12-14, 22-28). It now urges however that if counsel was unprepared "he had only himself to blame" (Br. 13).

The Government's untenable position in this entire matter is further emphasized by its final contention that Petitioner's guilt was so clear that it is difficult to believe that any amount of preparation could have changed the result. This Court has said many times that the right of a defendant to be represented by prepared counsel is so important that courts are not per-

mitted to speculate on the degree of prejudice which results from the denial of such a right. *Glasser* v. *United States*, 315 U.S. 60; *Hawk* v. *Olson*, 326 U.S. 271, 278. Petitioner's right to prepared counsel is so fundamental that its denial cannot be excused or explained by the bare statement that in the opinion of Government counsel his guilt was clearly established.

4. The Government's Brief glosses over the denial of due process and the unfair treatment accorded Petitioner by treating Petitioner's case as separate and distinct from the cases of his superiors. All these cases arose out of the same facts, they were all joined together in one indictment and disposed of practically as one case. It thus says that "the soundness" of the dismissal of the indictment against Kusper has no bearing on the merits of Petitioner's case (Br. 13). It also urges that the basic unfairness of the sentence imposed upon Petitioner in relation to the sentences imposed upon Brandt and Sobieraj raises no appellate question.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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